

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: )  
 ) MDL No. 1456  
PHARMACEUTICAL INDUSTRY AVERAGE ) CA No. 01-12257-PBS  
WHOLESALE PRICE LITIGATION )  
 )  
  
This Document Relates to: )  
UNITED STATES, EX REL LINNETTE SUN )  
AND GREG HAMILTON, Relators )  
V. ) CA No. 08-11200-PBS  
BAXTER HEMOGLOBIN THERAPEUTICS and ) Pages 1 - 29  
BAXTER INTERNATIONAL, INC. )

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
February 9, 2010, 3:35 p.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
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1       A P P E A R A N C E S:

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5       for the Plaintiffs.

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9       Defendants.  
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## P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action 01-12257 and 08-11200, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. KLEIMAN: Good afternoon, your Honor. Mark Kleiman appearing on behalf of the relators.

MR. JACKSON: Good afternoon, your Honor. Andy Jackson on behalf of Baxter, and my colleague to my left is Ruchi Jain.

THE COURT: Well, welcome to AWP world. So have any of you ever appeared in this litigation? You have.

MR. JACKSON: Yes.

MR. KLEIMAN: I have not, your Honor.

THE COURT: All right. So I've been doing this case for a decade, which gives me some knowledge, but, then, every case is different and every drug is different. So I thought maybe what I can do is start off with plaintiff. I've read the back-and-forth and back-and-forth, so I just want to understand a few things. What have you agreed needs to be dismissed?

MR. KLEIMAN: Your Honor, we've agreed that some of the state claims that I refer to in our original reply brief need to be dismissed.

THE COURT: Which ones are those?

MR. KLEIMAN: Well, if the Court will give me a

1 second, I will find them.

2 THE COURT: Well, there were four that you agreed flat  
3 out.

4 MR. KLEIMAN: Yes.

5 THE COURT: And I took notes. Utah, Arkansas, Texas,  
6 and Nevada, does that sound right to you where you just agreed  
7 flat out they needed to be dismissed?

8 MR. KLEIMAN: It does, your Honor.

9 THE COURT: But then Baxter argues -- and I didn't  
10 want to look up the law -- that with respect to every other  
11 one, you had to have some sort of a precomplaint disclosure.  
12 Did you agree to that?

13 MR. KLEIMAN: No, we did not, your Honor. Some of the  
14 statutes require a precomplaint disclosure, and some of the  
15 states, it's the AG's practice to waive it if disclosure has  
16 been made to the federal government.

17 THE COURT: Yes, but how am I going to know that? And  
18 I'm not doing the research in thirty states. So which are the  
19 ones you agree require precomplaint disclosures? Have you done  
20 that work yet?

21 MR. KLEIMAN: I have not. I do know that California  
22 does require a precomplaint disclosure.

23 THE COURT: So that gets dismissed.

24 MR. KLEIMAN: Yes.

25 THE COURT: So this is what I want you to give me

1 afterwards. Either, because I'm not doing the work -- I mean,  
2 I've done ten years of this -- either you agree that the state  
3 claim must be dismissed, or you give me a brief on why it  
4 shouldn't. And not that they usually waive it. Unless I have  
5 the waiver, it's gone, okay? So it can be without prejudice,  
6 but it's gone unless -- and so I'm sort of assuming -- let me  
7 ask Baxter this. You had some eager young associate who  
8 actually looked -- I'm looking at her probably -- who actually  
9 looked up all these state laws. Is that so?

10 MR. JACKSON: Yes, your Honor.

11 THE COURT: She's nodding. She was miserable. She  
12 did it. So I am going to assume that there's at least some  
13 research to back, is that true, for every state that was  
14 mentioned?

15 MR. JACKSON: Yes. Yes, your Honor.

16 THE COURT: So I'm going to likely dismiss all of  
17 those state claims. I just want to get through what's not a  
18 problem.

19 MR. JACKSON: Your Honor, I agree, and I was going to  
20 tick through those very quickly. We also have settled  
21 California, Illinois, and Hawaii, in addition to those that the  
22 relators have agreed we've settled and compromised. So we  
23 think for those states, that's a secondary reason why those  
24 cases should be out.

25 THE COURT: What I think probably makes the most sense

1 for me to do is just dismiss all the state claims without  
2 prejudice, and you can bring them back if you get the waivers  
3 or you -- well, if you get the waiver basically.

4 MR. KLEIMAN: That will be cleaner, your Honor.

5 THE COURT: Okay, all right, so we can just focus  
6 on --

7 MR. JACKSON: I had one more, your Honor, a quickie.

8 THE COURT: All right, I'm sorry.

9 MR. JACKSON: There was an agreement by the parties  
10 that the Stark Act, Count II, should be dismissed for failure  
11 to state a claim. There's no standing for a relator to make  
12 that claim.

13 THE COURT: Yes, and let me just say this: I will  
14 dismiss that but without prejudice. I know you don't want  
15 leave to amend, but at least this is early in this baby's life.  
16 So if they can amend it, I will let them amend it. So I'm  
17 dismissing the Stark claim. I'm dismissing all state claims,  
18 and all of these are without prejudice.

19 MR. JACKSON: Your Honor, just --

20 THE COURT: Let me just go through this because I  
21 think -- now, there's only been one complaint, right?

22 MR. KLEIMAN: Yes, your Honor. These are the first.

23 THE COURT: All right, so they're admitting that for  
24 particularity purposes, two drugs have been pled with  
25 particularity. They're admitting that. They have other

1 problems with it, but they, as I understand it, agree that  
2 Recombinate and Advate have been pled with particularity, but  
3 they say there are at least ten other drugs in there that are  
4 just mentioned once. And I didn't go through and actually read  
5 them with each one in mind. I read the beginning portion of  
6 the complaint, but that does seem to be right. So how do you  
7 get past 9(b) on every single drug, other drug?

8 MR. KLEIMAN: We would ask for leave to amend as to  
9 the following drugs, for which we can provide the requested  
10 information specifically, the stated average wholesale price  
11 for the periods in question, the actual prices, and the amount  
12 of the spread. Those drugs, and because there are just six of  
13 them, I'll mention them: Bebulin, B-e-b-u-l-i-n, Feiba H,  
14 F-e-i-b-a H, Hemophil M, H-e-m-o-p-h-i-l-M. And we think we'll  
15 be able to furnish the information for both Propelex,  
16 P-r-o-p-e-l-e-x, and Propelex LT.

17 MR. JACKSON: Your Honor, may I speak to that, please?

18 THE COURT: Well, I'm just -- well, let me just say,  
19 if it's only a question of whether they can plead the spread, I  
20 will let them amend to plead the spread. There's a bigger  
21 issue, which is whether these people are original -- whether  
22 they have been otherwise disclosed and whether these folks are  
23 original sources, right?

24 MR. JACKSON: Understood, your Honor, but I don't  
25 believe they've pled Recombinate or Advate with adequate

1 specificity under Rule 9.

2 THE COURT: You seem to say you did in one of the  
3 multiple briefs I got on this issue. You said, with the  
4 exception of those two drugs, not a word has been said about  
5 the other ones.

6 MR. JACKSON: That much is true, not a word has been  
7 said. So all the rest of them that are in Paragraph 20 of the  
8 complaint, nary another word is said about them. I would ask  
9 you to require or actually preclude them from amending their  
10 complaint. They filed a complaint. They filed an amended  
11 complaint.

12 THE COURT: Oh, they've already filed an amended? Am  
13 I looking at the right thing?

14 MR. JACKSON: They filed three pleadings now, and  
15 we've deposed --

16 THE COURT: Wait, wait. They filed three complaints?

17 MR. KLEIMAN: No, your Honor.

18 MR. JACKSON: No, your Honor, no. They filed a  
19 complaint and an amended complaint.

20 THE COURT: Yes.

21 MR. JACKSON: Okay. Then they've now filed at least  
22 three pleadings in connection with our motion to dismiss, and I  
23 have deposed the relators. And I know all the information they  
24 have, and they don't have any information regarding any of  
25 those drugs. Now, we'll talk a little bit about Recombinate



1 and Advate, but as to the other drugs --

2 THE COURT: You're saying that the original sources  
3 don't have any information about them?

4 MR. JACKSON: Yes, your Honor, that's exactly right.

5 THE COURT: Well, that may be, that may be. They can  
6 plead until they're blue in the face if they don't meet the  
7 subject matter jurisdiction test. So let's get to that because  
8 that's the hardest issue here.

9 So at least according to the affidavits, let me just  
10 say this, you've contested some of what they've said, but it  
11 strikes me that Sun and Hamilton are original source, at least  
12 with respect to something. It may not give them all ten drugs,  
13 especially Sun, or Soon. Is she Chinese? Soon, Sun?

14 MR. JACKSON: I pronounced it Sun in her deposition,  
15 and she didn't object to that.

16 THE COURT: All right, so she worked there and she has  
17 information about it, so at least -- you kept demeaning it, but  
18 at least with respect to Advate, she knows something about it.

19 MR. JACKSON: Well, I'm happy to address that, your  
20 Honor.

21 THE COURT: Yes, I think now is the time because I  
22 understand there is some interesting questions about the new  
23 AWP, like the "new black" or something, you know, and the  
24 new -- but the reality is, she was there. She has certain  
25 pricing information. She accused them of fraud. She claims

1 she was fired. It's in an affidavit. I don't know how that  
2 doesn't make her an original source, at least with respect to  
3 that drug.

4 MR. JACKSON: Well, because, your Honor, when she was  
5 deposed about her testimony, she had no information. So she  
6 may have at one point been involved with some pricing analysis  
7 regarding Advate. She mentioned two drugs, Advate and Aralast.  
8 Aralast, she provided no information in the complaint.

9 THE COURT: Wait. Is that one of the drugs here?

10 MR. JACKSON: It is one of the drugs, your Honor, but  
11 we think that, too, showed up in Paragraph 20 with no further  
12 allegations, no AWP's, no real prices, nothing. So we think  
13 that should be eliminated on 9(b).

14 Now when you move to what she said, I understand what  
15 her affidavit said. Her affidavit I believe was purposely  
16 vague because when I asked her very direct questions, your  
17 Honor, she has no information.

18 THE COURT: I know, but on subject matter  
19 jurisdiction, I'm not going to have an evidentiary hearing.  
20 She says one thing; you say another. I don't know how -- I  
21 mean, eventually, as in Rockwell, at trial, if it's disproved,  
22 I throw it out. But at least for that drug, she says she knows  
23 something.

24 MR. JACKSON: Except she doesn't, and that's the  
25 point. I really, you know --

1 THE COURT: You say she doesn't, but what evidence do  
2 you have of that?

3 MR. JACKSON: Her testimony.

4 THE COURT: Do I have the whole deposition?

5 MR. JACKSON: I believe we gave you everywhere in our  
6 final pleading where she spoke to that drug, and she has no  
7 memory or mention of any specificity. So, Judge, in the face  
8 of that contradictory evidence, I think you do have adequate  
9 information here to say, okay, you look at the affidavit, and  
10 it says she was involved in pricing. And, your Honor, I agree  
11 with you that the in-house employee who's in a pricing  
12 organization is the typical maybe relator who might have direct  
13 and independent knowledge under Rockwell. This one doesn't.  
14 So when tested, she had no such information. I kept asking her  
15 for documents that she --

16 THE COURT: Can I just back up on Advate. It wasn't  
17 even in existence till 2003, so it couldn't have been disclosed  
18 in public disclosures, right?

19 MR. JACKSON: Advate is not the subject of the public  
20 disclosures by name. Now, your Honor, I do believe that it is  
21 appropriate to dismiss Advate because it's no different --  
22 technically it is. It is --

23 THE COURT: I've ruled in the past, and you're sort of  
24 stuck with this, but I go drug by drug, company by company.

25 MR. JACKSON: I understand. I understand that, your

1 Honor.

2 THE COURT: Since it came in in 2003, as I understand  
3 it, there is no public disclosure of Advate.

4 MR. JACKSON: That's correct, your Honor.

5 THE COURT: So in and of itself, isn't that enough?

6 MR. JACKSON: Except she wasn't around when it was  
7 sold, so --

8 THE COURT: It's irrelevant if there's no public  
9 disclosure, right?

10 MR. JACKSON: Well, no, I think it is, your Honor, and  
11 this is precisely what I was going to. So you've got someone  
12 who purports to be a relator, who purports to have inside  
13 information.

14 THE COURT: No, but can we back up because I started  
15 off unfortunately on her because Advate, you only need to be an  
16 original source if it had been publicly disclosed; but since  
17 there's no public disclosure of Advate anywhere, you don't need  
18 the original source rule.

19 MR. JACKSON: That's correct, your Honor.

20 THE COURT: Then why would I dismiss it?

21 MR. JACKSON: Because she hasn't pled it. She hasn't  
22 plea adequately under all --

23 THE COURT: So that's your 9(b) argument, Advate.  
24 When all is said and done, Advate turns into a 9(b) argument.

25 MR. JACKSON: It is 9(b) plus, and the reason it's

1 "plus," Judge, is because I deposed her, and if you have a  
2 chance to read those deposition sections, she starts out in her  
3 declaration by saying, "Boy, I knew all about pricing," yet  
4 doesn't. So you are confronted with the issue of a relator who  
5 says, "I've got inside information," but doesn't.

6 THE COURT: This is a motion to dismiss --

7 MR. JACKSON: It is, your Honor.

8 THE COURT: -- for lack of subject matter  
9 jurisdiction. So I think Advate is in. I have problems with a  
10 lot of the other drugs, as I've made clear.

11 MR. JACKSON: I understand.

12 THE COURT: So, as I understand it, is she asserting  
13 that she's an original source with all drugs?

14 MR. JACKSON: She does, your Honor, but in deposition  
15 she admitted to knowing about two.

16 THE COURT: And the other one was the one you say  
17 wasn't mentioned for 9(b) purposes.

18 MR. JACKSON: Aralast and Advate, we've moved to  
19 dismiss both on 9(b). When asked at her deposition to fill in  
20 the blanks regarding those two drugs, she could not.

21 THE COURT: And in her deposition, does she claim any  
22 knowledge with respect to the other ten drugs or so?

23 MR. JACKSON: No specific knowledge whatsoever, your  
24 Honor.

25 THE COURT: Does Hamilton claim any knowledge with

1 respect to the other ten drugs?

2 MR. JACKSON: Hamilton's knowledge is entirely  
3 derivative, a telephone conversation with Kay Morgan at First  
4 Databank, whom I think you've probably seen in this courtroom  
5 maybe. He never worked for Baxter. The sole basis for his  
6 allegations relate to one drug, Recombinate. All of the  
7 information that he received regarding that drug came from a  
8 telephone conversation with Kay Morgan, a First Databank  
9 representative, so --

10 THE COURT: Is that the only drug he pretends -- not  
11 pretends -- he says he has information as to?

12 MR. JACKSON: Correct, your Honor.

13 THE COURT: All right, so what really that legal  
14 question boils down to is whether or not information from  
15 another person is enough to be direct information.

16 MR. JACKSON: Correct.

17 THE COURT: But before I even get there, was  
18 Recombinate expressly in any other complaint?

19 MR. JACKSON: Yes.

20 THE COURT: Which one?

21 MR. JACKSON: The MCC, the Nevada complaint.

22 THE COURT: Okay. Okay, so Recombinate is only saved  
23 if Hamilton is an original source?

24 MR. JACKSON: Correct.

25 THE COURT: Okay. But he says he doesn't know

1 anything about all these other drugs?

2 MR. JACKSON: Nothing.

3 THE COURT: Okay.

4 MR. JACKSON: Now --

5 THE COURT: Okay, thank you. As I understand it, I've  
6 often had this problem with what's direct and independent  
7 knowledge. I know what "independent" means. It means not  
8 based on a public disclosure. It's a whole lot less clear to  
9 me what "direct" means. You're taking the position it's got to  
10 be non-hearsay.

11 MR. JACKSON: Well, it's more than that, your Honor.  
12 The First Circuit, and I forget which of the cases, recently  
13 kind of had three little snippets on it. It has to be direct.  
14 It can't be derivative. It can't be through a secondary source  
15 or an "intermediary source" I believe is the language from the  
16 First Circuit. In fact it was in the West decision:  
17 "Firsthand knowledge of the alleged fraud obtained through the  
18 relator's own labor unmediated by anything else." And Hamilton  
19 could not be clearer or more direct that this all came from Kay  
20 Morgan.

21 THE COURT: But I'm not sure that's barred by that  
22 language you just read. I find that very difficult myself;  
23 like, essentially, if you didn't perceive it with your eyes but  
24 you heard it with your ears, somebody who was involved in it  
25 telling you about it, I'm not sure whether that's direct. It's

1 not so clear to me whether or not that's an admission that, you  
2 know, would be admissible, whether that makes it direct. But,  
3 anyway, I know the legal question, so it's very narrow and  
4 refined, so thank you.

5 Now, let me get to you for a minute.

6 MR. KLEIMAN: Thank you, your Honor.

7 THE COURT: These people don't know anything about  
8 anything other than these three drugs, right?

9 MR. KLEIMAN: That is not right.

10 THE COURT: Okay. Now, just understand, I've taken  
11 this, just the fact that it's drug by drug, company by company;  
12 so if you know there's a fraud for Activate, it does not  
13 necessarily make you an original source for these other twelve,  
14 whatever, ten drugs.

15 MR. KLEIMAN: I agree, your Honor, and I recognize  
16 that. There's the threshold question of whether or not any of  
17 the cases that were filed before this one had anything at all  
18 to do with the fraud that is alleged here; specifically, that  
19 knowing that First DataBank's hands were tied with respect to  
20 how it would have to handle WAC information, First Databank  
21 took --

22 THE COURT: I know you're trying to claim there's a  
23 new kind of AWP fraud, but as I read it -- I've been dealing  
24 with these kind of claims for ten years: What is WAC? How  
25 does it differ from direct price? How does it differ from list



1 price? What are you marking up by 1.25? -- it's not so new.

2 So let me just ask this question. I mean, in a way, you both  
3 suffer a little bit from my having done so many of these.

4 So is every single one of the other drugs mentioned in  
5 some complaint? Your answer is "yes"?

6 MR. JACKSON: It is.

7 THE COURT: Other than Activate and Recombinate?

8 MR. JACKSON: Recombinate is also mentioned in other  
9 complaints. The only two drugs that are not mentioned in  
10 preexisting complaints are Advate and Aralast.

11 THE COURT: All right, so the question that I have is,  
12 assume for a minute --

13 MR. JACKSON: Your Honor, I apologize. And Feiba.

14 THE COURT: Feiba. So if I find that there is no new  
15 AWP fraud with respect to First Databank, which has been in my  
16 cross-hairs now for a decade -- it's been all over these  
17 pleadings, in this case, the McKesson case, for anyone who is  
18 unfortunate enough to have to follow this litigation -- the  
19 question is, that typically was what I'd call the AWP/WAC  
20 fraud, which is a spread. Are all of those -- you've also pled  
21 what other kinds of fraud? Was there --

22 MR. KLEIMAN: Well, there's --

23 THE COURT: You're hoping to plead best prices or  
24 something?

25 MR. KLEIMAN: Yes, although having looked at the

1 Nevada complaint, we're prepared to return to your Honor's  
2 first question. We're prepared to concede that the best price  
3 allegations need to go as well. The --

4 THE COURT: So at the end of the day, you may be  
5 left -- I'm just trying to think. Intellectually speaking, I  
6 may not need to get into the issue of what's original source or  
7 not.

8 MR. KLEIMAN: Well, I think with Recombinate the issue  
9 is unavoidable, your Honor.

10 THE COURT: Because it had been mentioned, but he  
11 says -- so Recombinate is the one where you would say, "All  
12 right, we concede for purposes of this argument it was  
13 mentioned. We think it's a new AWP fraud, but even if you  
14 disagree with us, Judge, Hamilton is an original source," is  
15 that right?

16 MR. KLEIMAN: Yes, because of his discussions with Kay  
17 Morgan. If I may point out one further thing parenthetically  
18 but one that I think is important. In one of the early  
19 decisions in the class action litigation, this Court had to  
20 deal with sort of the obverse of that issue because the  
21 defendants were objecting, and this is 307 F. Supp. 2nd, your  
22 2004 decision on this.

23 THE COURT: 307 F. Supp. --

24 MR. KLEIMAN: F. Supp. 2nd at 196. Because in that  
25 case, the plaintiffs for the putative class were relying on

1 surveys the Court found that had been conducted by unnamed  
2 publishers showing that there was what they believed to be a  
3 spread and improper pricing. The Court found that the surveys  
4 the plaintiffs were relying on had all been undertaken before  
5 1992, and the reason that was important to the Court is that  
6 the allegations in the complaint all concerned behavior that  
7 had begun in 1991. And just as a 1992 survey is not going to  
8 support allegations about what had happened after that, we're  
9 in a situation where a single remark made in earlier complaints  
10 prior to 2000, or at least prior to May of 2000, can't really  
11 support an effective bar of public disclosure because we're  
12 talking about a different set of conduct. And I would ask the  
13 Court to, when it looks at this issue, look at that with --

14 THE COURT: Which drug are we talking about now?  
15 Which drug?

16 MR. KLEIMAN: Recombinate.

17 THE COURT: So it's only Recombinate?

18 MR. KLEIMAN: Yes, your Honor.

19 THE COURT: You're saying because there was only one  
20 comment about it in one complaint?

21 MR. KLEIMAN: Yes, your Honor.

22 THE COURT: Is that the argument?

23 MR. KLEIMAN: At least in one complaint that was  
24 unsealed as of the time --

25 THE COURT: And that was which one, the Nevada one?

1 MR. KLEIMAN: Yes, that was in the Nevada complaint.

2 THE COURT: But it doesn't matter, right, if he's an  
3 original source?

4 MR. KLEIMAN: I agree, it doesn't matter if he's an  
5 original source. I just wanted to address the threshold  
6 question.

7 THE COURT: I think I've got to say it's barred, don't  
8 I, because if there's a public disclosure in litigation, unless  
9 he's an original source?

10 MR. KLEIMAN: Well, the question is, what is barred?  
11 If what is barred is a fraudulent scheme that is alleged before  
12 this new scheme could have come into being, is it barred as  
13 to --

14 THE COURT: But that's only assuming it's a new  
15 scheme.

16 MR. KLEIMAN: That's right.

17 THE COURT: That somehow this First DataBank situation  
18 renders it a new scheme, right?

19 MR. KLEIMAN: That's right.

20 THE COURT: So could you explain that more to me, why  
21 it's suddenly a new scheme? Since 2001 when the master  
22 complaint was filed, they've been alleging that First DataBank  
23 was publishing false prices.

24 MR. KLEIMAN: Yes.

25 THE COURT: And so your issue with 2000, the

1 Department of Justice, predates that.

2 MR. KLEIMAN: It does predate that, but there's a  
3 difference in the false prices and what was getting reported,  
4 and this goes directly to what Hamilton learned, acknowledgedly  
5 via hearsay from Kay Morgan.

6 What was happening was this, and this is where his  
7 knowledge and Sun's knowledge dovetail: What First DataBank  
8 complained to and asked Hamilton about was why Baxter was only  
9 saying to First DataBank, "We're not giving you our WAC, we're  
10 not giving you any WAC information, we're just telling you our  
11 list price is X." This was something new. It's one thing for  
12 a drug company to falsely represent to First DataBank or  
13 Red Book or anyone else, "Our AWP is \$1.31," as an example.  
14 It's another for them to say, "Our list price is X, \$1.31.  
15 That's all we're telling you about our list price because we  
16 know that you're going to take that \$1.31, multiply it by 1.25,  
17 and calculate our AWP based on that because that's what you  
18 have to do under this new consent decree."

19 So what we believe --

20 THE COURT: But does that excuse -- I understand that  
21 that's a fraud if you give them a list price that you know is  
22 going to be used to turn into AWP. No quarrel there. I've  
23 been doing that for ten years. My concern is, that's what the  
24 first case was about. So if it actually mentioned false  
25 reporting to First DataBank, which was then transformed, either

1 directly AWP or it was transformed from WAC into AWP, wasn't  
2 that what the first case was about?

3 MR. KLEIMAN: That was the origin of this, yes.  
4 That's the genesis of this. What's different in our case, and  
5 the question for the Court is going to be whether it's  
6 different enough -- we think it is, Baxter thinks it's not --  
7 is whether --

8 THE COURT: And what did Hamilton know about it?  
9 Hamilton gets it from this Kay woman is what you're saying.

10 MR. KLEIMAN: Correct.

11 THE COURT: He finds out that they knowingly gave a  
12 false list price, knowing that First DataBank would multiply it  
13 by 1.25?

14 MR. KLEIMAN: Yes.

15 THE COURT: That's the gist of what you're saying is  
16 the fraud?

17 MR. KLEIMAN: Yes, it is.

18 THE COURT: So --

19 MR. KLEIMAN: And it is all derivative. My colleague  
20 is correct. Everything he knows about that came from his  
21 conversations with Kay Morgan with First DataBank.

22 THE COURT: And have you found any cases which deal  
23 with that issue, sort of as a borderline issue, which is, it's  
24 not your own company, you haven't seen it yourself, you haven't  
25 gotten the information yourself, but you're getting it from a

1 conversation with someone who is actually the perpetrator, or  
2 at least has themselves firsthand information? It's right in  
3 the gray area.

4 MR. KLEIMAN: It is acknowledgedly in a gray area, and  
5 there are some cases in which the government has intervened  
6 where it's not been an issue, and nobody's taken a shot at the  
7 relator afterwards. There are a series of cases called Health  
8 Outcomes Technologies. I'll furnish counsel and the Court with  
9 the cites tomorrow morning. But the issue regarding the  
10 standing of the relator, which was a third-party data-mining  
11 enterprise, as original source was not litigated in those  
12 cases. There is a case out of the Eleventh Circuit recently, I  
13 think two or three years ago, that goes exactly the other way,  
14 and it's U.S., Ex Rel Brickman v. Business Loan Center.

15 THE COURT: So this is a separate issue. That's when  
16 you get it out of that expensive publication, right, whether  
17 that's direct knowledge?

18 MR. KLEIMAN: Yes.

19 THE COURT: See, now, that strikes me as easier for  
20 their side than actually talking to someone who admitted to a  
21 fraud or admitted to knowing about a fraud or participating in  
22 a fraud. That's a different thing.

23 MR. JACKSON: But that's not what happened, your  
24 Honor.

25 THE COURT: I thought Kay said --

1 MR. JACKSON: All right, so Kay Morgan works for First  
2 DataBank.

3 THE COURT: Right.

4 MR. JACKSON: And according to Mr. Hamilton's  
5 testimony, she called him and said, "Jeez, why would Baxter do  
6 X, Y, or Z?" And they had a conversation.

7 THE COURT: Yes, so she's --

8 MR. JACKSON: But I think under this Court's O'Keefe  
9 decision --

10 THE COURT: Yes, but wait, wait. But she then  
11 publishes it. Isn't she an aider and abetter of a fraud?

12 MR. JACKSON: Well, I'm sure she would say "no"  
13 because we would say there's no fraud.

14 THE COURT: I mean, under their theory, I understand  
15 that, but under their theory, Baxter reports a price that is  
16 not a true list price under any definition. Less than one  
17 percent of the people pay it. It's not an average. It's under  
18 any theory a phony list price. Baxter knows that it's a phony  
19 list price. First DataBank is concerned because they know now  
20 it's a phony list price, but nonetheless they multiply it by  
21 1.25, and then use that as the basis for a rate of payment for  
22 the federal government and the Medicaid. So let's assume that  
23 for a minute: She knowingly publishes a price she knows to be  
24 false, not she personally but the company does. So is that  
25 firsthand -- I mean, it's pretty close to firsthand



1 information. Why not?

2 MR. JACKSON: I don't think so, your Honor.

3 THE COURT: Why?

4 MR. JACKSON: Take a look at the O'Keefe decision.

5 THE COURT: Isn't that mine?

6 MR. JACKSON: Yes.

7 THE COURT: Wasn't that that guy who was the  
8 transportation specialist going -- the railway in the South and  
9 he goes -- there were public --

10 MR. JACKSON: He's doing his own research.

11 THE COURT: He's doing his own personal research. But  
12 that's different from actually having someone say to you, "I  
13 know that we're publishing phony prices."

14 MR. JACKSON: Well, that's not what was said in our --

15 THE COURT: I'll go look at it, but it's a pretty  
16 different fact scenario.

17 MR. JACKSON: And I would also direct your attention  
18 to the Woonsocket case out of the First Circuit.

19 THE COURT: What happened there?

20 MR. JACKSON: That's where the First Circuit said a  
21 relator who goes and does research from -- you know, he wasn't  
22 direct, he wasn't the classic relator, insider working on  
23 pricing -- that's not good enough. And that makes sense,  
24 Judge. Remember, this is a very special, narrow exception to  
25 normal standing law, and I believe Congress intended only those

1 insiders with direct information, as discussed in Rockwell, are  
2 the kind of people that fit within the definition of relator,  
3 and --

4 THE COURT: Well, but in a way it's begging the  
5 question, what's direct? I find it difficult, so I don't  
6 pretend to have the answer. At one extreme, it's the insider  
7 like Ms. Sun who was actually there looking at the pricing and  
8 involved in the pricing. The other extreme is my gentleman in  
9 the O'Keefe case who was a public gadfly who went about doing  
10 proactively his own research in public files and that sort of  
11 thing. And then we have something in between where he's  
12 actually spoken to someone who divulged inside information  
13 about the fraud, but he doesn't know it firsthand. I mean,  
14 that's sort of the in-between one.

15 MR. JACKSON: And she's not part of Baxter either.

16 THE COURT: Well, she knows what prices she's getting  
17 from them.

18 MR. JACKSON: Theoretically she knows what prices, so  
19 I think it's even a step removed, your Honor.

20 THE COURT: But I'm just saying, somewhere in that  
21 spectrum in between, and I've got to figure out how close it  
22 gets. I don't think you have to meet the hearsay Rules of  
23 Evidence necessarily to be direct.

24 MR. JACKSON: Again, your Honor, it seems to me, based  
25 upon the cases that have dealt with the issue, that it is this

1 derivative intervening event, and that's the intervening event,  
2 someone else between Baxter and Mr. Hamilton.

3 THE COURT: I find it hard.

4 So let me just summarize where we are at this point,  
5 okay? I find these things like Sudoku puzzles.

6 MR. JACKSON: I hate them, so I don't know how to  
7 pronounce them.

8 THE COURT: Actually, I think they're good for  
9 keeping -- don't they say it keeps your mind alive? So we're  
10 dismissing all states without prejudice, gone; dismissing all  
11 drugs for which there are not specific allegations. So that  
12 essentially means, that leaves us with, the only specific  
13 allegations are Advate and Recombinate, right?

14 MR. KLEIMAN: Yes.

15 THE COURT: With respect --

16 MR. JACKSON: -ish, your Honor. I don't think it's  
17 adequate, but --

18 THE COURT: -ish, okay, all right, I understand. I'm  
19 not saying you're conceding it, but at least we all agree that  
20 with respect to the others, nothing is said, so they're all  
21 dismissed without prejudice.

22 With respect to Advate, it was not, by concession,  
23 reported in any of the earlier complaints or public news  
24 reports, and so therefore the original source rule is  
25 irrelevant, and likely 9(b) suffices, so likely there's going

1 to be a complaint that's continuing on Advate.

2 Recombinate is wide open. That's the one I need to  
3 decide because that hinges -- there was a disclosure in the --  
4 what did you tell me it was in?

5 MR. JACKSON: It was in the MCC, your Honor.

6 THE COURT: In the MCC.

7 MR. JACKSON: As well as the Nevada.

8 THE COURT: Nevada, or "Nevahda" as we say around  
9 here. So the only out for the plaintiffs, unless there's a new  
10 AWP, the only out is whether or not Hamilton qualifies as an  
11 original source, and I'm going to have to do some research on  
12 really where in the spectrum one becomes direct.

13 Stark is out without prejudice, so that's Count 2.  
14 The best prices are gone, right?

15 MR. KLEIMAN: Right.

16 THE COURT: With prejudice.

17 MR. KLEIMAN: Right.

18 THE COURT: Does this make sense? So I've got one  
19 thing to get back to you on. And so while we're all here,  
20 since Advate is likely to go forward, and that right now is the  
21 only one I am at least relatively certain will go forward, the  
22 question is, have you got a proposed discovery schedule for  
23 Advate?

24 MR. KLEIMAN: We don't, your Honor, although we could  
25 certainly confer and get the Court one by next week.

1 THE COURT: Why don't you just do that so you don't  
2 have to come back here.

3 MR. JACKSON: That's fine, great.

4 THE COURT: Let me go off the record for a minute.

5 (Discussion off the record.)

6 THE COURT: Thank you very much. So the one open  
7 piece here is Recombinate and the direct issue for us.

8 MR. JACKSON: Well, obviously, your Honor, I'd like  
9 you to go back and look at the 9(b) arguments.

10 THE COURT: I will, but that's a little harder for you  
11 because they actually mention prices and specifics and that  
12 sort of thing. On the other hand, with the other drugs, there  
13 was nothing. So thank you. I hope I don't see you again, but  
14 should I -- I'm sure I will -- you know, build in a regular  
15 dispositive motion. Whether it's summary judgment or motion to  
16 dismiss I'll leave to you. But otherwise I think we're at the  
17 point where we sort of know where the rough points are, and if  
18 you can't settle it, then I'll have to rule. That would be  
19 great. Okay, thank you.

20 MR. KLEIMAN: Thank you.

21 MR. JACKSON: Thank you, your Honor.

22 (Adjourned, 4:18 p.m.)  
23  
24  
25

## C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter,  
do hereby certify that the foregoing transcript, Pages 1  
through 29 inclusive, was recorded by me stenographically at  
the time and place aforesaid in Civil Action No. 01-12257-PBS,  
In Re: Pharmaceutical Industry Average Wholesale Price  
Litigation, and thereafter by me reduced to typewriting and is  
a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 7th  
day of March, 2010.

/s/ Lee A. Marzilli

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LEE A. MARZILLI, CRR  
OFFICIAL FEDERAL COURT REPORTER